On Review:

The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Volume 1, Antecedents and Beginnings to 1801

By Julius Goebel, Jr.

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Reviewed by David S. Bogen

Editor's Note: After receiving his LL.B. from Harvard, Professor Bogen clerked for Justice Jacob Spiegel of the Massachusetts Supreme Judicial Court. He then received an Arthur Garfield Hays Civil Liberties Fellowship to New York University Law School, where he earned his LL.M. He spent two years in New York as an associate in a large firm before he came to the University of Maryland School of Law where he is now an Associate Professor.

More than half a century ago, the ideal education was "classical education." French and Latin became so much a part of the student's intellectual equipment that they provided the natural idioms for expressing thoughts precisely. Another hallmark of such an education was an impressive vocabulary of words found only in the unabridged version of the dictionary. Procedural minutiae that drug with sleep less hardy souls stimulate the classicist to probe deeper the institutions involved. Professor Goebel's volume of the Holmes Devise History of the Supreme Court is a stunning display of such classical erudition. Thus, it may be forbidding to those educated in a different mold. Its assumption of large chunks of English and American history as common knowledge may similarly reduce its readership. This is a shame, for every American lawyer should have and read the Holmes Devise volumes in order to understand the system within which he or she works.

Despite its intimidating aspect, the classical tradition contains timeless virtues. One virtue is the scholarship shown in the patient search through mounds of paper for small bits of significance. In such a way, Professor Goebel traces the procedures for initiating legal actions and for securing review of decisions in England and in each of the States. He then is able to demonstrate what each State's law contributed to the Judiciary Act of 1789 and the Process Acts of 1789, 1792, and 1793, and to give some idea of the divergencies in practice between the States which the federal acts carried into the new federal system.

Professor Goebel's classical style of writing is often enlivened by his literary wit and grace. Referring to the large body of prize cases involving treaties with France, he writes "These were problems that blew in from the sea, so to speak, precipitated by war and by the prompt commitment of the United States to a policy of neutrality."[1] A prize case which dragged out over more than a decade is pictured as "the barnacled litigation."[2] These images may carry the modern reader through many of the travails that Professor Goebel's erudition causes.

While each of the succeeding volumes of the Holmes Devise spans less than three decades of Supreme Court history, this first volume traverses centuries—from Coke's England in the sixteenth century[3] to the Supreme Court as it delivered its opinions at the opening of the nineteenth century.[4] In addition, Professor Goebel deals with the jurisprudence of a great number of jurisdictions—both England and each individual State—to show how the institutions and procedures of each jurisdiction were incorporated or rejected in establishing the federal judicial system. This sweep has resulted in a tendency to summarize records and cases rather than letting the characters speak for themselves. Personalities thus remain misty and vague. A better portrait of the judges and the circumstances of their appointment may be found in briefer works.[5] The thrust of Professor Goebel's volume is instead on the intellectual history of the Court—the ideas, events, statutes and prior cases from which the Court's own processes and decisions were drawn.

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One major theme of this volume is the background of judicial review for constitutionality. Professor Goebel does a meticulous job of setting forth the English precedents for reviewing colonial legislation. The notion that a law of the local lawmaking body might be voided by some other body was thus a familiar one to the citizens of the new nation. But Professor Goebel is not wholly successful in proving that these precedents were the source of our concept of constitutional review by a court.[6] The Privy Council was not an ideal institution to colonists who found that their laws were disrupted and could be struck down because thought to be unwise rather than simply contrary to charter.

Professor Goebel does demonstrate that, whatever its source, judicial review for constitutionality was well accepted prior to Marshall's opinion in *Marbury v. Madison*.[7] Justices Wilson[8], Ellsworth[9] and Chase[10] had all expressed the idea that the Court should declare laws unconstitutional in a proper case. The justices individually on circuit had already presented remonstrances to the President to the effect that the Pension Act imposing duties on them was not constitutionally authorized; Wilson and Blair refused to perform any duties under it.[11] Several State laws had been declared unconstitutional by Supreme Court justices sitting on the Circuit Courts[12] and the full Court sustained the constitutionality of at least two statutes without even questioning the propriety of engaging in constitutional review.[13] That the first statement of the principle in a holding of the full Court awaited Marshall's ascent to the Chief Justiceship is, therefore, merely an accident of litigation.

Much of Goebel's volume discusses the history of the establishment of the Court, its background in English law, the debates over it at the Constitutional Convention and the drafting of the Acts regulating its procedures. Of the remaining portion of the book, nearly as much space is devoted to the business of the Circuit Courts as to the decisions of the early Court. To bring the new Court closer to the people, Congress had established Circuit Courts consisting of two Supreme Court justices sitting with one District Court judge. Not only did these Circuit Courts have appellate status over the District Courts, but they had an extensive original jurisdiction as well. Meanwhile, the full Court had to wait until these cases had been decided before it had any significant business of its own. During the first three years of the Court's existence, the Terms of the Court were essentially formal rituals with no cases ready for the Court to hear. The greatest portion of the Justices' time was thus spent riding circuit, a fact which deterred several men from

seeking the office and was bemoaned by almost all who were required to do it.

The largest single group of cases before the Supreme Court in this early period were prize decisions concerning shipping captured by privateers and brought into American ports. Professor Goebel carefully traces the antecedents of these cases from English courts through State courts and the Continental Congress' Committee on Prize Appeals.[14] He shows how carefully and well the Supreme Court decided the prize cases before it, rejecting the legality of consular prize courts,[15] scrupulously enforcing the neutrality laws which prevented privateering by American citizens or American ships,[16] but allowing French privateers to keep their prey although those privateers had repairs done in American ports.[17] Prize appeals today are, hopefully, of little relevance to our pressing legal problems. They are, however, of historical interest with respect to incidental problems of procedure and citizenship laws, and they indicate how well the fledgling institution was performing.

The performance of this Court in one case still reverberates today. Mr. Chisholm brought suit claiming that his decedent had delivered goods to the state of Georgia for which payment was not made. Jurisdiction was claimed under Article III which extends the judicial power to "Controversies . . . between a State and Citizens of another State." The debates in the Convention shed little light on whether States retained immunity from private suits as Georgia claimed. Alexander Hamilton in The Federalist Papers attempted to allay State fears by arguing that any federal judgment on a debt owed by a State could not be enforced short of war.[18] Meanwhile Madison, one of the most active men in the framing of the Constitution, stated at the Virginia Ratification Convention that controversies between a State and citizens of another State could only exist where the State was the plaintiff or where it had consented to be sued.[19] But the language of the Constitution made no specific reference to State sovereign immunity. The jurisdictional language of Article III in particular made no distinction between suits where the State consented and those where it did not. Justice Iredell found that Congress had not passed any legislation authorizing such a private suit in assumpsit; but the other four justices thought general procedural statutory language was sufficient to permit this suit, and, following the plain meaning of the document, agreed that States were subject to suit.

This case received the greatest criticism of any decision made prior to the ascent of John Marshall to the Chief Justiceship. Indeed, it provoked the Eleventh Amendment, which prohibited suits against a State by citizens of another State. Yet surely no State feared paying the bills for goods which it had purchased. Consent to such a suit in State Courts is today almost automatic since suppliers would be chary of a buyer who could keep the goods and refuse payment leaving the supplier no legal recourse. Thus Georgia was not frightened at the notion of paying Chisholm, but the States could foresee later cases where sharp differences might arise over whether debts for huge sums were properly owing. Many States had passed laws confiscating British property during the revolution. Such laws would be upheld by the State courts, but the States could not be so certain of the result in federal courts.[20] The States were not willing at this time to place themselves so completely at the mercy of the Union. The notions of state sovereignty so fearfully put at hazard in Philadelphia[21] were too strong to allow federal control if it was not strictly necessary for the preservation of an effective nation. However worthy such suits might be to attain individual justice, they were hardly indispensable to the functioning of the nation. In fact, the Constitution at this time did not protect individual rights against the States to a significant degree. To hold this nation together, the Court could still mediate conflicts between the States. That was enough for then.

We have come a very long distance from those early days. The effective administration of a modern nation has greatly reduced the power of States as separate entities. The Fourteenth Amendment has given significant protection to the individual against the State. The Eleventh Amendment looks in this context anachronistic. After *Ex Parte Young*[22] which permitted suits enjoining state officials from acting in an unconstitutional manner, the Eleventh Amendment's effect has been only a partial protection of State treasuries. Meanwhile the

size of those treasuries depends more on decisions made in Washington, D. C., than on any immunity from private suits.

Marshall's great decisions helped nationalize the country and increased the power and influence of the Court, but only a decade earlier the decision in *Chisholm* had provoked a reaction which increased local autonomy and weakened the Court. It was necessary to exist awhile as a nation before we could trust ourselves in this new situation. For Marshall, as it is for us, "The readiness is all."[23] In Professor Goebel's volume we find the strands traced which made the time ready for John Marshall.

FOOTNOTES

[1] J. GOEBEL, 1 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 760 (1971) [hereinafter GOEBEL].

[2] *Id.* at 766.

[3] *Id.* at 58.

[4] *Id.* at 778.

[5] 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922).

[6] See the review of Goebel's book by Prof. Horwitz, 85 HARV. L. REV. 1076 (1972).

[7] 5 U.S. (1 Cranch) 137 (1803).

[8] GOEBEL, *supra* note 1, at 330.

[9] *Id.* at 338.

[10] *Id.* at 651.

[11] *Id.* at 560-651.

[12] *Id.* at 589-92.

[13] Hylton v. United States, 3 U.S. (3 Dallas) 171 (1796), discussed in GOEBEL, *supra* note 1, at 778-782; and Calder v. Bull, 3 U.S. (3 Dallas) 385 (1798), discussed in GOEBEL, *supra* note 1, at 782-784.

[14] GOEBEL, *supra* note 1, at 147-195.

[15] *Id.* at 760-765.

[16] *Id.* at 770-776.

[17] *Id.* at 776-777.

[18] *Id.* at 317; THE FEDERALIST No. 81 at 548-549 (Cook, ed. 1961). The implication being that, practically, there was no need to worry since no federal government would be stupid enough to attempt enforcement.

[19] GOEBEL, *supra* note 1, at 385; ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS III at 532.

[20] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

[21] Professor Goebel's focus on the structure of the judiciary makes his discussion of the Constitutional Convention seem like attending a feast with a muzzle. One loses the impulses which later become critical to constitutional decisions.

[22] 209 U.S. 123 (1908).

[23] Shakespeare, Hamlet, Act V, Scene 2.
